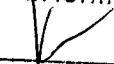


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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**In Re the Marriage of:**

RONALD L. GATES, Respondent,

vs.

KYON BRUNDAGE, Appellant

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Lewis County Superior Court

Cause Nos. 11-3-00226-0

The Honorable Judge Nelson E. Hunt

**Appellant's Brief**

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### **ASSIGNMENTS OF ERROR**

1. Judge James W. Lawler committed error by denying the appellant's motion for a two-week continuance to allow her new counsel to represent her due to counsel's conflict on the day of trial.
2. Judge Nelson E. Hunt committed error in Finding of Fact 2.21 by finding that Ronald Gates was a vulnerable adult and that Kyon Brundage violated her fiduciary duty and thereby caused him financial ruin.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When a continuance of a few weeks is requested a month before trial because a party is attempting to retain counsel who has a conflict on the date of trial; the requested time for trial would place it at approximately one year from the time of filing; and the case had previously been continued by agreement of the parties because of an ongoing need for discovery and the fact that on the prior trial date it was very unlikely that they would go to trial due to a murder trial set for the same week; was in error for the court to deny a continuance of a few of weeks to allow the requesting party to be represented by counsel?

### **STATEMENT OF FACTS**

Ron Gates and Kyon Brundage were married on August 19, 2004. (CP 2) They separated on May 24, 2011. (CP 2) On June 8, 2011 Ronald Gates (age 75) filed for dissolution of marriage to his wife Kyon Brundage (age 71). (CP 1) He signed the petition himself on June 3, 2011. (CP 4) Summons by mail was filed with the court on July 22, 2011 (CP 5) and it

was signed for by Ms. Brundage in Arizona on July 26, 2011. (CP 8) On October 20, 2011 a trial date was set for February 29, 2012. (CP 27)

On January 31, 2011 the trial date was continued by motion of the respondent and stipulated to by the parties, the court order stated that the continuance was:

Based upon the need for continuing discovery, and compliance with existing discovery requests, and the fact that only one judge is potentially available the week that trial is currently set (February 29, 2012) and a murder trial set to occur that week, the court finds good cause to strike the trial date on 2/29/12-3/1/12. (CP 51)

It was signed by Judge Richard L Brosey. The new trial date was set for May 9, 2012. (CP 57)

The same day this order was entered in court, Robert Schroeter filed his notice of intent to withdraw as attorney for Ms. Brundage and the next day he filed an amended notice of intent to withdraw. (CP 52-53) A withdrawal and substitution of counsel was entered on February 13, 2012 with Dana L Williams substituting in. (CP 54-56) Mr. Williams filed his notice of intent to withdraw on March 14, 2012.

On April 11, 2012, Roberta Church filed a Limited Notice of Appearance, signed on April 4, 2012, which would become effective on June 1, 2012 if the trial date of May 9-10, 2012 was continued. (CP 60) That date she also filed a docket notice for the hearing of a Motion and

Declaration for Temporary Order which was noted for April 20, 2012. (CP 63) Finally, on that date Ms. Church filed a Motion and Declaration for Temporary Order which was signed only by Ms. Brundage. (CP 61-62) Her motion was to continue the trial date. In her declaration she stated that she had found a new attorney but that the attorney was not available for trial on May 9-10, 2012. She then requested that the case be continued to the closest available date after June 1, 2012. (CP 61-62) It was signed on April 5, 2012 in Avondale, Arizona. (CP 62)

On April 18, 2012 Mr. Gates filed his responsive declaration. (CP 64-65) In it he stated that he opposed the continuance because she had already had 2 attorneys. The first apparently withdrew following the 1st settlement conference and the second withdrew following the 2nd settlement conference. He claimed that the last continuance was to accommodate Ms. Brundage's attorney's withdrawal. Without providing any basis of knowledge he then claimed that Ms. Brundage fired the second attorney and therefore she chose to get a new attorney. (CP 64) He then stated that the last continuance cost him extra money and this continuance would also cost him extra money. He concluded by pointing out that he is not getting any younger and he speculates that it appears that Ms. Brundage "is deliberately trying to drag this matter out." (CP 65) The declaration was signed by Mr. Gates. (CP 65)

The hearing was held on April 20, 2012. (Continuance Motion RP 1) At the hearing Ms. Brundage was not present and Ms. Church appeared, but stressed that she was not representing Ms. Brundage unless the case was continued. (Continuance Motion RP 4-5)

Mr. Gates' attorney, Kelli Bringolf, argued what had been presented in Mr. Gates' declaration. She then commented that she was unaware that the continuance was being requested because of the other attorney's unavailability. She had originally thought that Ms. Church should have had plenty of time to prepare because she filed her notice of appearance on April 4th which was over a month before trial. (Continuance Motion RP 5-6)

The Court then asked Ms. Church if she wanted to be heard, and she stated:

Ms. Brundage approached me about being her attorney for the trial and I explained to her that I had other commitments at that time, and then she went ahead with this if I would agree to help her if the trial date got continued. (Continuance Motion RP 6-7)

The trial court then issued its ruling, stating:

All right. Well, the matter is set for trial May 9th and 10th. I'm going to deny the motion for the continuance. There is a long history here. The matters been set. There--I don't want to encourage the behavior of firing attorneys and hiring attorneys in order to get continuances, so we'll leave that on for the 9th and 10th. (Continuance Motion RP 7)

The trial began on May 9, 2012. (RP Vol. I 1) Ms. Brundage did not have counsel representing her. (RP Vol. I 3) Mr. Gates did not testify in the trial. Only his 2 daughters testified, Renell Hull and Sharlynn Gates. (RP Vol. I 12-119) ER 904 documents, with 112 documents, had been submitted by Ms. Bringolf the same day that Ms. Brundage's first attorney withdrew and the 14 days expired the day after the new attorney submitted the substitution of counsel. (CP 28-50, 54-56) There was never an objection filed. As a result, these were admissible at trial. (RP Vol. I 5)

Ms. Brundage did not know what she was doing in representing herself in the trial. She did not know how to make an opening argument. (RP Vol. I 1-12)

She did not know how to make an objection nor did she know the rules of evidence. ( RP Vol. I 37, 84-85, 94-95, 98-99, 102-103, 106, 108, 109-110 ) Even the trial court noted this on the record. (RP Vol. I 37, 69) Of the 6 objections she made, only one was sustained and that was on a basis different from the reason for the objection (the objections were made because Ms. Brundage thought the facts were wrong, not because the statement violated a rule of evidence). ( RP Vol. I 84-85, 94-95, 98-99, 102-103, 106, 108)

She did not know how to question witnesses. When her first question on cross of Renell Hull was objected to she did not attempt to ask her any more questions. (RP Vol. I 62)

She did not know how to call witnesses. She had no witnesses ready for trial, but rather had notarized statements that she believed she could present in lieu of their live testimony. (RP Vol I 119) She was able to get 3 witnesses to testify at trial the next day, but these were not all of the witnesses whose testimony she attempted to get in through notarized statements. (RP Vol. I 50-73) One of these whose testimony did not come in was an accountant who would have testified regarding the parties 2005 taxes. (RP Vol. I 126-127) Another witness she needed was someone who could testify about a police report from Maricopa, Arizona regarding Mr. Gates' arrest and being placed in jail for domestic violence. (RP Vol. I 123) The court refused to admit this because there was no one to testify regarding it and because the court felt that it was irrelevant as the case did not involve custody of children. (RP Vol. I 123-124) Even when she testified, she tended to ramble, the Court noted that he was “not hearing a lot of testimony about the property”.(RP Vol. II 28)

She also had a physical disability in her hearing. (RP Vol. I 28, 34-35, 82) It was noted on the record that the court waited for her to get her hearing aid in. (RP Vol. II 91)

Ms. Bringolf was clearly aware that Ms. Brundage did not know the rules of evidence. She lead extensively, over 43 times. (RP Vol. I 16-18, 23, 33, 36, 41-45, 48, 51-53, 54-61, 63, 64-67, 85, 88, 90, 93, 96-98, 100, 104-107, 109-110)

She also submitted evidence that was inadmissible, but there was no objection. Testimony came in from Sharlynn Gates, identifying a list for illustrative purposes only, of property that was left in the Port Angeles and Arizona homes. (RP Vol. 107) Sharlynn testified that the maker of the list was her sister who talked to her father to make the list. There was no objection raised by Ms. Brundage. (RP Vol. 107)

Exhibit number 58 was Mr. Gates financial declaration. (RP Vol. I 109) Sharlynn testified that it was her father's signature on the declaration. (RP Vol. I 109,110) Ms. Brundage again did not object to the admission of the exhibit. (RP Vol. I 109-110) It was at this point that Ms. Brundage acknowledged that she did not know what to say because it was not true, but she knew the court did not accept that as an objection, so the exhibit was admitted. (RP Vol. I 109-110)

Exhibit number 59 was also utilized for illustrative purposes and was Mr. Gates proposed division of assets. (RP Vol. I 16, 110) This was the division of property that proposed to give Mr. Gates property that Ms. Brundage owed prior to the marriage. (RP Vol. I 110-111) Sharlynn was

allowed to answer in the affirmative to the leading question that this was what her father was "proposing as a just and equitable division of assets". (RP Vol. I 110-111) There was no testimony presented as to the maker of the document. This document was used as the basis for the court's division of property. ((RP Vol. II 88) Once again, there was no objection made by Ms. Brundage to this document.

To establish vulnerability at trial, Ms. Bringolf presented Renell Hull's testimony that Ms. Brundage had her father's power of attorney. (RP Vol. I 17) In response to the question of the purpose for the power of attorney the following testimony was given:

A: My dad had a stroke and was incapacitated.

Q: And what date did he suffer the stroke?

A: He had a stroke on December 15th, 2009.

Q: Okay. So not quite a month later a power of attorney was granted to Ms. Brundage?

A: Yes.

Q: Okay. Was Mr. Gates able to manage his financial affairs after his stroke?

A: No.

Q: Was he able to think clearly?

A: No.

Q: Was he able to care for himself physically?

A: No. (RP Vol. I 17-18)

Next, Sharlynn testified regarding exhibit number 29 (This exhibit is not currently in the court papers. It was requested but the clerk was not able to immediately find it because it was in ER 904 pleading and was not formally admitted at trial. A copy of it is attached hereto and Incorporated

herein by reference for the court pending the clerk's paper being transferred to the court.) This exhibit contained some discharge papers from Providence Hospital and some medical bills. After being presented with this exhibit, Sharlynn was asked:

Q And under speech pathology, can you try to read what the doctor has written?

A "Patient has continued to improve cognitive processes but still presents deficits in thought, organization, and sequencing. Continued concern for safety awareness for transition. Recommend home health care facilities."

Q Okay. Maybe services?

A Services.

Q Okay. And in the paragraph above, does it indicate that he should -- under physical therapy, does it indicate that he should have somebody with him at all times?

A Yes. (RP Vol. I 63)

She further testified that on December 20, 2010 her father had a heart attack while in Phoenix, Arizona. (RP Vol. I 64) Ms. Brundage was in Washington State at that time. (RP Vol. I 64-65) Through a leading question, she referred back to the discharge statement quoted above for the proposition that he was supposed to have someone with him at all times. (RP Vol. I 65)

Finally she testified that on May 10, 2011 her father had a fall while living in Washington State in a trailer on property owned by Ms. Brundage. (RP Vol. I 65-66) Ms. Brundage was staying in an apartment at that location and Mr. Gates had been staying in the trailer. (RP Vol. I 65-

66) As a result of the fall he suffered “a fracture of the nasal bone, a laceration repair”, and “tears to his scalp.”(RP Vol. I 71) Ms. Brundage never objected to the relevancy of this testimony.

Ms. Brundage did however testify that in December 2010 her husband was "doing great every day". (RP Vol. II 35) He was going on walks sometimes 3 times a day. (RP Vol. II 35) When she left she wanted him to come with her but he refused saying that he would be just fine there. (RP Vol. II 35) When she left she had made arrangements with the local police department for a senior program called YANA which stood for You Are Not Alone. (RP Vol. II 35) This program provided for a volunteer to come by the house on a regular basis to check on him. (RP Vol. II 35) Her son also came by to visit him and brought him dinner one night. Finally, a friend of hers who lived nearby also agreed to check on him. (RP Vol. II 35-36) She was gone for a total of 4 days.

In regard to May 10, 2011, Ms. Brundage testified that Mr. Gates liked to stay in the trailer because it had TV reception and the apartment did not. (RP Vol. II 32) She had put a Porta-Potty out there for him. (RP Vol. II 32) He was excited because that day they were going to a timeshare in Lake Chelan with all his siblings. It had taken her 3 years to get the reservations. (RP Vol. II 32) She had gone out at 7 o'clock in the morning to help him get ready when she found blood and discovered that

he had been injured. (RP Vol. II 32) He told her that he was excited for the trip so he got up early and went out without his walker. (RP Vol. II 32) A tenant at the apartment call the police when they noticed blood outside and Ms. Brundage explained to them what happened. (RP Vol. II 33) She then took him to the emergency room. (RP Vol. II 33)

Ms. Bringolf presented testimony claiming that the Maricopa , Arizona property was foreclosed on because Ms. Brundage stopped making the monthly payment. (RP Vol. I 74-77, 100) The Port Angeles property was foreclosed on due to failure to pay the mortgage. (RP Vol. I 87-89) It was also claimed that she failed to make payments on his Citbank card and Discover card resulting in judgments (RP Vol. I 59, 60-61); and that she failed to properly care for one piece of property that was condemned. (RP Vol. I 85) Lastly, Ms. Brundage took money from Mr. Gates' IRA to pay for a house in Avondale, Arizona. (RP Vol. I 24-25, 29, 91)

Ms. Brundage testified that she was advised, first by her brother, then by REM financial in Arizona, and finally by Mr. Gates; that she should stop making the payment because he was trying to get a loan modification and that was the only way it could be obtained. (RP Vol. II 23-24, 45) The Maricopa, Arizona property was an interest only property that had no equity, this was also part of the property he turned over to

REM Financial in Arizona for debt settlement. (RP Vol. II 20-21) Ms. Brundage provided canceled checks to the court and claimed that she was paying bills, but she did not explain to the court how the checks related to the bills that were paid. (RP Vol. II 128-129) Ms. Brundage testified that she discussed the transfer of his IRA money with Mr. Gates and he had given his permission. (RP Vol. I 25, Vol. II 38-39) This was to buy property in Arizona where he could live closer to the hospital in a better place in the wintertime. (RP Vol. II 37)

The court followed illustrative Exhibit 59, with a couple of minor exceptions, and awarded 4 pieces of property to Mr. Gates that were Ms. Brundage's separate property. These were Fords Prairie, Lake Desire, Clearview Heights Drive, and Roanoke Street. (CP 72) He did this by ruling that Mr. Gates was a vulnerable adult and that Ms. Brundage intentionally mismanaged his property in order to pay for and take care of her own.

## ARGUMENT

WHEN A CONTINUANCE OF A FEW WEEKS IS REQUESTED A MONTH BEFORE TRIAL BECAUSE A PARTY IS ATTEMPTING TO RETAIN COUNSEL WHO HAS A CONFLICT ON THE DATE OF TRIAL; THE REQUESTED TIME FOR TRIAL WOULD PLACE IT AT APPROXIMATELY ONE YEAR FROM THE TIME OF FILING; AND THE CASE HAD PREVIOUSLY BEEN CONTINUED BY AGREEMENT OF THE PARTIES BECAUSE OF AN ONGOING NEED FOR DISCOVERY AND THE FACT THAT ON THE PRIOR TRIAL DATE IT WAS VERY UNLIKELY THAT THEY WOULD GO TO TRIAL DUE TO A MURDER TRIAL SET FOR THE SAME WEEK; IT WAS ERROR FOR THE COURT TO DENY A CONTINUANCE OF A FEW OF WEEKS TO ALLOW THE REQUESTING PARTY TO BE REPRESENTED BY COUNSEL.

The standard for review of a motion for continuance is for an abuse of discretion. In the case of *In re V.R.R.*, 134 Wash. App. 573, 141 P.3d 85, 89 (2006) presented the standard as follows:

We review a trial court's decision to deny a continuance for manifest abuse of discretion. *City of Tacoma v. Bishop*, 82 Wash.App. 850, 861, 920 P.2d 214 (1996). A trial court abuses its discretion when it exercises that discretion based on untenable grounds or reasons. *State ex rel Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted. *Bishop*, 82 Wash.App. at 861, 920 P.2d 214. When denial of a motion to continue allegedly violates constitutional due process rights, the appellant must show either prejudice by the denial or the result of the trial would likely have been different if the continuance was granted.

State v. Tatum, 74 Wash.App. 81, 86, 871 P.2d 1123, rev. denied, 125 Wash.2d 1002, 886 P.2d 1134 (1994). (at 580-581)

The above case involved a termination of parental rights following a dependency. The father had counsel represent him in the dependency. The petition for termination of parental rights was filed in August 2004, and the father, representing himself, participated in a court hearing on August 12, 2004. On October 25, 2004 a notice of the trial date was set for a two-day trial on January 25, 2005. The father did not get counsel appointed until the day before trial (there was nothing in the record to indicate why the attorney was appointed the day before the hearing). It was the same counsel that had represented him previously in the dependency. The father's attorney requested a continuance from the attorney for DSHS and it was agreed to, until father failed to show up for trial the next day. The father had missed the bus. The father's attorney's motion to continue the trial so that he could prepare was denied. The attorney for DSHS opposed the motion because the father was not present and the Guardian ad litem opposed the motion because the father's attorney had represented him in the dependency proceedings and because the matter "had been pending for at least three years and the children needed resolution." (at 579) The trial court denied the motion to continue the trial.

In its analysis reversing the trial court, the court cited the case of *City of Tacoma v. Bishop*, 82 Wash. App. 850, 920 P.2d 214 (1996) where Bishop had been given several continuances to allow him to obtain counsel and he had failed to do so. Finally, the court in that case denied his request for continuance and forced him to go to trial. In that case, this court, Division 2, ruled that Bishop's conduct was not sufficiently egregious to forfeit his right to representation and reversed because the court had not warned him of the consequences of his failure to obtain an attorney. (Bishop, at 860)

The court next considered the case of *In re Welfare of G.E.*, 116 Wash. App. 326, 65 P.3d 1219 (2003) where the father had gone through 3 appointed attorneys and then on the day of trial he wanted a new attorney and a continuance. The court allowed his third attorney to withdraw, but did not appoint new counsel and required him to represent himself. Once again, this court, Division 2, ruled that this was not sufficient to deny him his right to counsel. (at 337)

Citing these cases, the court in *In re V.R.R.*, supra, concluded that the father's conduct was not such that a continuance should not have been granted. As a result, they reverse the trial court.

In the case of Ms. Brundage, she had never been long without an attorney. When her first attorney withdrew on January 31, 2012, 13 days

later she had a new attorney. After the notice of withdrawal of the second attorney, a limited notice of appearance was filed by Ms. Church 3 weeks later. It also has to be borne in mind that Ms. Brundage was residing in Arizona at this time and even despite the fact that she was residing out-of-state she had still obtained new counsel in relatively short periods of time.

There was also no proof that she fired her second attorney or that she was hiring Ms. Church in order to get a continuance. If she were in fact trying to get a continuance, would it not have made more sense to request a continuance in excess of a couple weeks? There was nothing here to substantiate any inference that she was seriously seeking to delay the trial. She clearly was acting with due diligence to obtain counsel at all times.

In *Chamberlin v. Chamberlin*, 44 Wash. 2d 689, 270 P.2d 464 (1954) the State Supreme Court dealt with a continuance specifically in the context of a dissolution of marriage. In that case they defined "abuse of discretion as follows:

The meaning of the term 'abuse of judicial discretion' as applied to divorce cases is not confined to deciding a case by whim, caprice, or arbitrary conduct, through ulterior motives or in willful disregard of a litigant's rights, but it also includes a discretion exercised upon grounds or to an extent clearly untenable or manifestly unreasonable. *Holm v. Holm*, 27 Wash.2d 456, 178 P.2d 725; *Gordon v. Gordon*, Wash., 266 P.2d 786.

The court went on to further qualify this as follows:

Most courts, including this court in the Strom and Zulauf cases, follow this general rule:

‘Whether the ruling of a court on a motion for a continuance is within the proper exercise of its sound discretion usually depends on the facts of the particular case, the chief test being whether the grant or denial of the motion operates in the furtherance of justice. \* \* \* a continuance should be granted if a denial thereof would operate to delay or defeat justice; and courts have been said to be liberal in continuing a cause when to do otherwise would deny applicant his day in court.’ (Italics ours.) 17 C.J.S., Continuances, § 6, p. 194. (at 703)

In the case of Ms. Brundage, the denial of the requested continuance denied her the opportunity to have an attorney to represent her and denied her a meaningful day in court. The denial of the short continuance defeated justice in this case as she was ill prepared to represent herself and the short continuance would not have delayed the trial to a significant degree. Even though there had been a continuance previously it had been stipulated to by the parties and the reality of the situation was that a murder trial scheduled for the same week would have necessitated the first continuance that was granted regardless. The denial in this case was clearly an abuse of discretion.



The continuance that was being requested was for a very short period of time, there was nothing indicating any intent to delay the proceedings. The requested continuance was only for a couple of weeks and if the case could have been heard by or before June 8, 2012 it would have been within a year of the date the case was filed. In any event, it would have been well within a year of the date that Ms. Brundage was served. The only harm identified by Mr. Gates in opposition to the continuance was that it would cost him an unspecified amount of money for his attorney's efforts in the continuance process and because he was not getting any younger. However, there was no evidence that Mr. Gates' health was likely to deteriorate in any degree over the course of a couple of weeks for the continuance.

The reason for the continuance was certainly consistent with the furtherance of justice. It was based upon the fact that the attorney Ms. Brundage was seeking to retain was unavailable on the day of trial. When arguing this motion, counsel for Mr. Gates appeared surprised by this information. There was no request by Ms. Church to continue the case based upon her need to prepare for trial, she was fine with a very short continuance, she simply was unavailable on the day of trial. Given these facts, it was clearly an abuse of discretion to deny the requested continuance.



As a result of this ruling, which was made on April 20, 2012, 19 days before trial, Ms. Brundage was unable to obtain counsel for the trial. At that point in time, where would she be able to find an attorney who would be able to adequately represent her on May 9, 2012 knowing that a continuance motion had already been denied? At that point in time it was literally impossible for Ms. Brundage to obtain counsel.

The court's ruling meant that Ms. Brundage would have to represent herself at trial. At the age of 71 years, with no legal training or background, and being hard of hearing, Ms. Brundage was forced to represent herself against experienced trial counsel. This was an involved case with 112 ER 904 documents which were admissible and numerous other documents introduced as exhibits in addition to that. There was virtually no way for an experienced attorney to become adequately prepared to represent her, and she was certainly in no position to adequately represent herself. This was a travesty of justice and a manifest abuse of discretion to put her in this position.

The result for Ms. Brundage was that she lost 4 pieces of real estate that she owned prior to the marriage. This was her separate property. In the case of *In re Estate of Borghi*, 167 Wash. 2d 480, 484-85, 219 P.3d 932, 935 (2009) the State Supreme Court stated:

Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property. 19 Weber, supra, at 134. As we stated in Guye v. Guye, 63 Wash. 340, 115 P. 731 (1911):

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear. Id. at 352, 115 P. 731. (at 484)

In regard to the division of separate property, in the *Matter of Marriage of Olivares*, 69 Wash. App. 324, 848 P.2d 1281(1993) disapproved of on other grounds by *In re Estate of Borghi*, 167 Wash. 2d 480, 219 P.3d 932 (2009) the court stated:

Only in unusual circumstances would the trial court award the separate property of one spouse to the other. *Merkel v. Merkel*, 39 Wash.2d 102, 115, 234 P.2d 857 (1951). (at 330)

Against this jurisprudential backdrop Ms. Brundage lost 4 pieces of separate property which was awarded to Mr. Gates.

Although it is not necessary to show that the outcome of the matter would have been different had the continuance been granted unless it is argued that there was a violation of the constitutional right to counsel, in this case the outcome would certainly have been different had Ms.

Brundage had prepared counsel representing her. One of the principal reasons for the court's decision was because he decided that Mr. Gates was a vulnerable adult. The definition of a vulnerable adult that appears to be the basis upon which Ms. Bringolf appeared to be relying based upon what evidence was presented is found in RCW 74.34.020 (17) (a) which reads as follows:

- (17) "Vulnerable adult" includes a person:
  - (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself;

In this case the evidence to show this was marginal at best. That proof consisted of the following evidence. Through Exhibit 29, the discharge papers from Providence Hospital, it stated that as of the date of discharge, February 25, 2010, "Patient has continued to improve cognitive processes but still present deficits and thought, organization, and sequencing. (RP Vol. I 63) It also stated under physical therapy that he should have someone with him at all times. (RP Vol. I 63) There was evidence that he a second stroke in December 2011. Lastly there was the evidence admitted to leading questions of Renell Hull that Mr. Gates was unable to manage his financial affairs after his 1st stroke; unable to think clearly; and unable to care for himself physically. (RP Vol. I 17-18) Basically, Ms. Bringolf asked leading questions consistent with the bare-bones definition of a vulnerable adult found in subsection (a).

However, there was no testimony from any medical provider to verify the leading statements. There was no evidence to show that the deficits suffered immediately upon discharge on February 25, 2010 continued for any substantial period of time following his discharge. In fact, the discharge records themselves indicated that he continued to improve. Ms. Brundage's testimony was to the effect that he did exactly that, continue to improve. In fact, by December 2011 her testimony was that he was doing well. The only testimony that could substantiate that he was a vulnerable adult came from the bare-bones answers to 3 leading questions without any medical substantiation beyond the date of discharge from his first stroke.

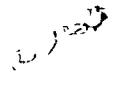
If in fact he was unable to think clearly, why did he sign all of his own declarations and the petition? Why did his counsel not seek a Guardian ad litem to represent him? He never testified at trial, so the trial judge was unable to receive any direct evidence based upon Mr. Gates' own testimony as to his mental capacity. All the judge was left with was to simply look at him at counsel table.

At trial Ms. Bringolf continued to highlight that Mr. Gates was not supposed to be left alone, however, there was no evidence admitted other than the fact that immediately upon discharge from the hospital following his first stroke in February 2010 he was not to be left alone. There was no

evidence presented that during that time period immediately following his discharge from the hospital he was ever left alone. It is not uncommon for someone who is discharged from the hospital to not be left alone during the period of recuperation, but this does not mean that this is a condition that remains for the rest of their life. There was no medical testimony to backup or substantiate any such position, however, it was continually highlighted and clearly for the purpose of trying to solicit sympathy from the court as opposed to provide objective evidence.

The fact that when Mr. Gates had his second stroke, and Ms. Brundage happened to be in Washington for a few days at the time, has no corollary or connection with any requirement that Mr. Gates not be left alone. The fact that she was gone did not cause him to have second stroke. Nor was there any evidence ever submitted to show that he was particularly vulnerable to a stroke and that this was the reason why he was not to be left alone following his discharge for his first stroke. However, this was something that was highlighted in testimony clearly designed to garner sympathy rather than provide objective facts to the court.

Again, when Mr. Gates fell in May 2011, there was once again, no medical testimony to show that someone needed to be with him at all times. In fact that entire incident was completely irrelevant to the division of property and was once again only submitted for the purpose of



soliciting sympathy from the court. It is interesting to note in this regard that when Ms. Brundage attempted to submit information of domestic violence committed by Mr. Gates, the court denied her admission of this evidence because the case did not involve children in custody. However, there was relevancy in this evidence because if he was physically able to commit domestic violence against her, and was arrested and taken to jail as a result of it, that does show something about his physical abilities to function at that time.

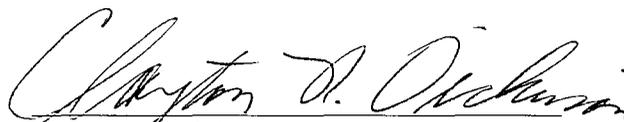
Had Ms. Brundage had competent counsel representing her at trial she would have been able to point these things out to the judge and should have been able to properly object to keep much of this testimony out. It is questionable whether the finding of vulnerability could of been made if proper objections and cross examination could have been done in the trial.

It was not a mere harmless error that Ms. Brundage was denied a continuance and effectively denied counsel to represent her at trial. The transcript makes it clear that Ms. Brundage did not know what she was doing and was totally ill-equipped to represent herself. The result of this was an unprecedented loss of 4 pieces of real estate that were her separate property, having been owned by her since before the marriage. This travesty of justice must be corrected by this court in this case must be remanded for a new trial.

## CONCLUSION

The denial of a continuance in this case was a clear abuse of discretion. The request for the continuance was to enable Ms. Brundage's new attorney to be present at trial due to a prior conflict. The requested continuance was for a very short period of time consisting of a few weeks. It would have placed the trial at approximately one year from the date of filing. There was no proof of any intent to hire new counsel in order to obtain a delay in the trial and there was no showing of any harm to Mr. Gates by the continuance other than an unspecified amount of attorney fees. At the time the continuance was requested its denial insured that Ms. Brundage would be unable to be represented by counsel at the trial. Under these facts it was an abuse of discretion to deny the motion for a short continuance and require a 71-year-old woman with no legal training to represent herself pro se in the dissolution proceedings. For the foregoing reasons, this Court must reverse the decision of Judge Lawler denying the continuance and remand the case for a new trial.

Respectfully submitted on November 29, 2012.

  
Clayton R. Dickinson, WSBA No. 13723  
Attorney for Appellant

CERTIFICATE OF MAILING

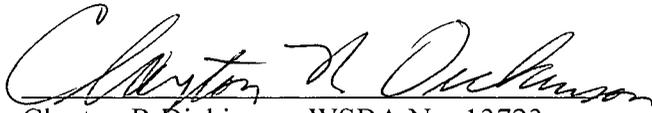
I certify that I mailed a copy of Appellant's Brief Review to:

Samuel Tye Menser and Robert Martin Morgan Hill  
Morgan Hill PC  
2102 Carriage Dr. SW. Bldg C  
Olympia, WA 98502-5700

All postage prepaid, on November 29, 2012.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

Signed at Fircrest, Washington on November 29, 2012.



Clayton R. Dickinson, WSBA No. 13723  
Attorney for Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
2012 NOV 29 PM 1:36  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

# Appendix A

Exhibit 29



1PER

Patient Name: Ronald Gates

Physician: Dr. Kevin Caserta

Initial Conference: \_\_\_\_\_

Discharge Conference:

Date: 1/1  
Date: 2/25/10

NURSING: Medically Stable - Stable. EPO need Et  
Account today

Signature: [Signature]

Date: 2/25/10 Time: 1415

OCCUPATIONAL THERAPY: Ron is able to do his dressing, grooming (brushing teeth, shaving, etc.), + bathing himself, however, requires someone to be there at all times to watch him for safety especially when he is standing. Ron is safer if performing his daily routine sitting down in the wheelchair. We recommend therapy at home to make sure his home environment is as safe as possible.

Signature: [Signature]

Date: 2/25/10 Time: 1349

PHYSICAL THERAPY: Ron is moving well and can do most things himself, but has balance issues that put him at risk for falls. He needs someone with him at all times and needs to use walker/belt for safety. May benefit from wheelchair for really long distances. Recommend continued therapy at home to further his independence.

Signature: [Signature]

Date: 2/25/10 Time: 1345

SPEECH PATHOLOGY: Pt. has cont'd to improve in cognitive processes but still presents deficits in thought organization and sequencing. Continued concern for safety awareness for transition to home. Recommend cont'd SH Home Health Services.

Signature: [Signature]

Date: 2/25/10 Time: 14:10

SOCIAL SERVICE: have provided patient (Ronald) and family with community resource info. SS will set up Home Health Services (PT, OT, ST). re: hiring Assi. Staff at home. Ronald will discharge home with spouse (Kyan) who will provide

Signature: [Signature]

Date: 2/25/10 Time: 1415

MEDICAL: \_\_\_\_\_

Signature: \_\_\_\_\_

OTHER DISCIPLINES: \_\_\_\_\_

Date: 1/1 Time: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: 1/1 Time: \_\_\_\_\_

PATIENT / FAMILY REMARKS: Things went well - Need Dr's OK on March 20th Wash DC hip - need results of Cat Scan to Olympia Drs. - May need help in ordering/sizing of home equipment. Family appreciates the good care here.

Patient Signature: \_\_\_\_\_

Date: 1/1 Time: \_\_\_\_\_

Family Member Signature: [Signature]

Date: 2/25/10 Time: 2:15

Family Training: \_\_\_\_\_

Home Evaluation: \_\_\_\_\_

Estimated Length of Stay: Discharge planned for Monday March 1, 2010 at 2:00pm O.P. Therapy \_\_\_\_\_ OT \_\_\_\_\_ PT \_\_\_\_\_ SP



REHABILITATION  
FAMILY / PATIENT STAFF CONFERENCE

Patient Identification:

GATES, RONALD L  
DOB: 11/23/36 73Y M MR: 000-32-95-51  
ACCT: C100-4300236 DOS: 02/12/10



Patient: GATES, RONALD L

Account: 3-01-42-97

 RONALD L GATES  
 511 HWY 603  
 CHEHALIS, WA 98532

3014297

 For Account Questions  
 Please call: (206) 598-1950  
 Weekdays: 8AM - 4PM

Bill Number: 0002 Date: 03-25-10

PAGE 1

## Summary Of Charges

ADMITTED 12-15-09 DISCHARGED 01-22-10

## SUMMARY OF CHARGES

DAILY SERVICE: 28 DAYS@	1,885.68	52,799.04
DAILY SERVICE: 3 DAYS@	4,768.20	14,304.60CR
DAILY SERVICE: 13 DAYS@	4,768.20	61,986.60
PHARMACY		30,983.56
IV THERAPY		940.37
NON-STER SUPPLY		142.40
STERILE SUPPLY		21,707.58
LABORATORY		643.57
LAB/CHEMISTRY		4,722.87
LAB/IMMUNOLOGY		27.08
LAB/HEMATOLOGY		2,008.02
LAB/BACT-MICRO		2,085.81
LAB/UROLOGY		63.28
PATHOLOGY LAB		423.40
DX X-RAY		3,560.05
DX X-RAY/CHEST		1,022.48
CT SCAN		43,863.31
OR SERVICES		27,655.20
ANESTHESIA		6,489.60
ULTRASOUND		330.67
PHYSICAL THERP		463.02
PHYS THERP/EVAL		223.61
OCCUPATION THERP		634.38
SPEECH PATHOL		453.53
EMERG ROOM		2,162.02
MRI		2,366.76
DRUGS/DETAIL CODE		10,959.22
RECOVERY ROOM		4,352.70
EKG/EKG		124.87
OTHER VASCULAR STUDIES		877.58

 TOTAL CHARGES 269,767.98

YOUR INSURANCE WILL BE BILLED

WRITE CHECKS PAYABLE TO:

Desert Surgical Assistants, LLC  
 10930 N Tatum Blvd Ste 103  
 Phoenix, AZ 85028-6069

ADDRESS SERVICE REQUESTED

JOSHUA RANNEY, PAC      GREGORY SPAYDE, PAC  
 LORI CUSHUE, PAC      NANCY LAMBERT, PAC  
 MICHELLE CAREY-CASKEY, RNFA

PATIENT: RONALD GATES  
 BILLING QUESTIONS: (602) 263-7600 EXT: 108

RONALD GATES  
 18136 W PASEO WAY  
 GOODYEAR AZ 85338-5243

Please check box if above address is incorrect or insurance information has changed, and indicate change(s) on reverse side.



CREDIT CARDS

CHECK CARD USING FOR PAYMENT

Mastercard     Visa     Discover

CARD NUMBER	CVV	AMOUNT
SIGNATURE		EXP. DATE
STATEMENT DATE	PAY THIS AMOUNT	ACCT. #
May 03, 2011	\$ 367.22	32258

SHOW AMOUNT PAID HERE \$

\*WE DO NOT ACCEPT AMERICAN EXPRESS\*\*

REMIT TO:

Desert Surgical Assistants, LLC  
 10930 N Tatum Blvd Ste 103  
 Phoenix, AZ 85028-6069

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYMENT

DATE	CODE #	DESCRIPTION	CHARGES	PAYMENTS CREDITS	INSURANCE BALANCE	PATIENT BALANCE
12-20-10	335338	CAB; ARTERY; X1 INS BAL	1100.00	825.00		275.00(2)
	45108	CORONARY BYPASS; ARTE INS BAL	218.90	164.18		54.72(2)
	33508	ENDOSCOPIC VEIN HAR INS BAL	150.00	112.50		37.50(2)
04-15-11	1	Payments received in last 30 days: PMT PRIMARY INSURANCE		1101.68		
TOTALS					0.00	367.22
(2) - This item is the patients responsibility						

AGING	CURRENT	PAST 30 DAYS	PAST 60 DAYS	PAST 90 DAYS	PAST 120 DAYS	TOTAL
INSURANCE						0.00
PATIENT				367.22		367.22

Desert Surgical Assistants, LLC  
 BILLING QUESTIONS: (602) 263-7600 EXT: 108  
 PATIENT: RONALD GATES  
 ACCOUNT: 32298

STATEMENT

PLEASE PAY THIS AMOUNT » \$ 367.22

74

